



**A HISTORICAL ANALYSIS OF THE POSSE COMITATUS ACT  
AND  
ITS IMPLICATIONS FOR THE FUTURE**

by

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Bachelor of Science  
United States Air Force Academy, 1990

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Submitted in Partial Fulfillment of the  
Requirements for the Degree of Master of Criminal Justice  
in the College of Criminal Justice  
University of South Carolina  
1996

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College of Criminal Justice  
Director of Thesis

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## ABSTRACT

This historical analysis of the Posse Comitatus Act consisted of a historical review of Congressional Records and a comparison, or differentiation, between the circumstances that existed when the Act was passed and the circumstances of the current era. The purpose of the analysis was to show that the Posse Comitatus Act is an unnecessary hindrance to the modern criminal justice system. The research indicated that the circumstances have changed enough since the Act was passed that the reasons for its original passage are out of date. In addition, it is apparent that the Posse Comitatus Act is currently being applied improperly, which would explain the great deal of confusion that surrounds it. Recommendations for future studies would be a more detailed look at the misapplication of the Act, and the problems that misapplication of the Posse Comitatus Act creates.

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## CHAPTER I

### INTRODUCTION

#### Statement of Problem

During the last 15 years there has been a tremendous increase in United States expenditures to fight the "War on Drugs." These increased expenditures have included increased use of the military to aid civilian law enforcement agencies in their attempts to halt the flow of drugs into the United States. This was only possible by passing amendments to previous government legislation that dates back to the 1800's (Inciardi, 1992). This previous government legislation is called the Posse Comitatus Act; and while it has been changed a little in the last decade and a half, it remains pretty much the way it was originally written over one hundred years ago. This Act currently states that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both (Use of Army and Air Force as posse comitatus, 1994).

The Act while not explicitly applicable to members of the Navy and Marines has been made applicable to those personnel by the Secretary of the Navy (Hilton, 1983).

This Posse Comitatus Act has posed some problems for the criminal justice system since it has been used as a defense tactic by defendants that are being indicted for drug offenses. This tactic calls for the exclusion of evidence that is obtained with military assistance since that assistance in enforcing civilian law is thought to be a violation of the Act (Gates, 1982).

### Methodology

To study the current status of the Posse Comitatus Act and to determine whether or not it has lived out its usefulness, it will be necessary to look at the reasons for its passage and to compare and contrast those reasons with current circumstances in the United States.

In order to determine the reasons for the passage of the Posse Comitatus Act, it will be necessary to look at the historical circumstances leading up to the passage of the Act itself. This will involve a look at the American colonial era, the early history of the growing United States, Civil War politics, and post-Civil War happenings. The primary emphasis will be placed on the stated reasons given by the politicians, mainly in the House of Representatives, who drafted and passed the Act in 1878. This information is available, through extensive historical document research, in the Congressional Records of floor debates for the era.

It will also be necessary to take these reasons for the passage of the Posse Comitatus Act and "modernize" them. This will involve looking at the changes that have occurred in the United States in the more than a century that has passed. It will be necessary to prove the remaining need or the current lack of modern requirement for each

of the reasons for the passage of the Posse Comitatus Act, in order to determine whether or not the Act is a relic of the past or an important legal rule for the future.

### Purpose of Analysis

This analytical history will demonstrate that the Posse Comitatus Act has outlived its usefulness in the political arena and more importantly is a hindrance to today's criminal justice system. The study will attempt to enumerate the reasons for the original passage of the Posse Comitatus Act following post-Civil War reconstruction. Once those reasons are enumerated it will be possible to individually evaluate each of the reasons for any modern implications that may exist, and to determine whether the Posse Comitatus Act provides the means to protect the reason cited. The final document will contain the results and conclusions from the study.

## CHAPTER II

### REVIEW OF LITERATURE

The Posse Comitatus Act is not a very well studied area of criminal justice or law. In fact, it has rarely been applied in its over 100 year history. It was characterized in 1948, by a federal circuit judge in *Chandler v. United States*, as “this obscure and all-but-forgotten statute” (Meeks, 1975, p.85). This obscurity has become a thing of the past with many cases requiring the courts to determine the applicability of the Act (Meeks, 1975). While the Posse Comitatus Act has lived the majority of its existence in anonymity, there have been a number of articles written concerning the history of the Act and its impact. It is interesting to realize that these articles are almost exclusively from the last half of the 20<sup>th</sup> Century, since the use of the Posse Comitatus Act has been confined almost entirely to that time frame.

Major H.W.C. Furman wrote an article in 1960 that is utilized in nearly all other articles written since then. His article gave a detailed history of the need for and passage of the Posse Comitatus Act. He also spent a great deal of space defining every term within the codification of the Posse Comitatus Act. This was an attempt to help individuals understand the purpose and defined applicability of the Posse Comitatus Act (Furman, 1960).



Engdahl wrote an article published in the Indiana Law Journal in 1974 which expanded the history provided by Furman. It spent a great deal of time discussing the pre-American and post-Revolutionary War era of military use as law enforcers. He then discussed the new Civil Disturbance Regulations that were passed in the early 1970's, and how these regulations rely on statutory and Constitutional exceptions to the Posse Comitatus Act in order to be valid (Engdahl, 1974).

In 1975, Major Clarence I. Meeks, III, of the United States Marine Corps, wrote an article on the Posse Comitatus Act. However, his article did not spend the majority of its time on the history of the Act. Instead he tried to provide an explanation of who, when, and where the Act applied; and what an individual's responsibilities were in relation to the Act. He closed with a brief explanation of the possible civil liability that could result from a violation the Posse Comitatus Act under the Federal Tort Claims Act (Meeks, 1975).

Another article, from 1976, followed the earlier standard of providing a detailed history of the passage of the Posse Comitatus Act and provided information on the statutory and Constitutional exceptions that existed. However, for the first time there was also a look at court cases and their outcomes. This was due to a new trend that developed with the occupation of Wounded Knee, South Dakota in the spring of 1973. This new trend was the attempt to utilize the Posse Comitatus, not as a criminal sanction, but as a tool to exclude evidence. This article was the first to show the tremendous impact that the Posse Comitatus Act was beginning to have on the criminal justice system (O'Shaughnessy, 1976).

John D. Gates rediscussed many of the same areas that O'Shaughnessy covered in his article, but he added the new idea that the United States Coast Guard, Navy and Marine Corps, were not covered under the Posse Comitatus. The Act only applies to the Army and the Air Force, and therefore the use of other branches would seem to bypass the Act (Gates, 1982).

Larry L. Boschee took an entirely different approach than previously used. He chose to look at the court cases that had taken place, and the written opinions in those court cases, to provide a four part test to determine whether or not a violation of the Act has occurred. He then discussed the future possibilities, as indicated in court opinions, of the application of an exclusionary rule to situations involving violations of the Posse Comitatus Act (Boschee, 1985).

It is obvious that the majority of the articles do not provide anything other than a history of the passage of the Posse Comitatus Act, and only a few provide any sort of detailed explanation of how to interpret the Act and apply it to everyday usage. This lack of explanation, the inconsistent explanations between individuals, and the lack of consistent rulings within the court cases cited shows that there is still a great deal of confusion nearly 120 years after the passage of the Act. It shows that there is a definite need to take a critical look at the Posse Comitatus Act and determine whether or not it has outlived its usefulness in the modern day United States of America.

### CHAPTER III

#### HISTORY OF THE POSSE COMITATUS ACT

The history of American mistrust of the military is very long. It springs from the very same process that gave birth to the United States. For example, early American colonists were not supportive of the British practice of requisitioning their property for the quartering of British soldiers (Meeks, 1975).

The "Boston Massacre" in 1770, which left five colonists dead and many others wounded following a confrontation between British soldiers and disorderly colonists, was one of the most grievous examples of the problems between civilian colonists and the British military. From this point on the British military was used to quell many other disturbances, including the Boston Tea Party in 1773. These problems with military interference in civilian life was a major basis for the Declaration of Independence which listed several items of contention concerning military interference in the lives of the colonists (Meeks, 1975).

The delegates to the Constitutional Convention in 1787 were very concerned with the problems of military interference, this was exhibited in the fear of a standing army. For this reason, they included in the Constitution several safeguards to prevent the military from gaining too much power (Meeks, 1975). These included vesting control of the military in a civilian, the President as Commander-in-Chief (Art. II § 2 as cited in The

Constitution, 1991, p.11); and giving the legislative branch the power to raise a standing army (Art. I. § 8,cl.12 as cited in The Constitution, 1991, p.7), control the state militias when in the service of the federal government (Art. I. § 8,cl. 16 as cited in The Constitution, 1991, p.7), review of military appropriations (Art. I. § 8,cl. 12 as cited in The Constitution, 1991, p.7), and the power to declare war (Art. I. § 8,cl. 11 as cited in The Constitution, 1991, p.6).

There were also several safeguards placed in the Bill of Rights, at the request of the states which were also very concerned about the problems of maintaining a standing military. These fears were written into the Second and Third Amendments to the Constitution. The Second Amendment states:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed (The Constitution, 1991, p.21).

While the Third Amendment holds that:

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law (The Constitution, 1991, p.21).

These Amendments make it obvious that the newly independent people of the United States were afraid of what maintaining and standing military would mean to their individual civilian freedoms.

While these items show the fears of early Americans, they do not in themselves constitute the reasons for the passage of the Posse Comitatus Act. "Probably no two incidents directly influenced the passage of the Posse Comitatus Act as much as did the

'Kansas disorders' and the supervision of post civil war elections in the South" (Furman, 1960, p.93).

The "Kansas disorders" resulted from the election in the territory of Kansas of a pro-slavery legislature and an anti-slavery governor. By August of 1855 the governor and his supporters were demanding statehood while the legislature and pro-slavery supporters had taken up arms in order to fight. Federal forces were sent in to restore and maintain order until Kansas achieved statehood (Furman, 1960).

Following the Civil War the South was divided into military districts under military rule. These military forces were also responsible for "registering the voters, supervising the election of delegates to constitutional conventions, supervising the conventions and supervising the ratification of the Fourteenth Amendment to the Constitution" (Furman, 1960, p.94). However, after ratification of the Fourteenth Amendment the Congress continued to interfere with the internal affairs of the Southern states. "The most hated policy instituted in the name of political stabilization of the South was the maintenance of carpetbaggers and scalawags in positions of power. The South, in the eyes of its politicians, was being denied the fundamental rights of self-government" (O'Shaughnessy, 1976, p.704-705). This was evidenced by the use of federal troops in the state of Louisiana, where these troops occupied the State Legislature (O'Shaughnessy, 1976).

In 1874, the House of Representatives was under the control of Democrats, primarily from the South, while the Senate remained under Republican control. By 1877, white democrats had gained control of all the Southern states except for Florida, South Carolina and Louisiana. The final straw for the Southern politicians came with the Presidential election of 1876, when the Democrat nominee Samuel Tilden ran against the

Republican nominee Rutherford B. Hayes. During the elections, federal troops were sent into the states of Florida, South Carolina, and Louisiana in order to guard the election booths and committees because the outcomes of the elections there were unclear. Tilden had 184 uncontested votes to Hayes' 165; with 185 being needed for majority election. The electoral votes of Florida, South Carolina, and Louisiana were in question; and totaled twenty, the exact number needed by Hayes to win the election. A special commission was setup to resolve the controversy, and this commission was composed of eight Republicans and seven Democrats. As expected, all twenty electoral votes were given to Hayes by an eight to seven vote of the commission. Southern Democrats believed that the use of federal troops was partially to blame for the election loss (Meeks, 1976). Soon after these Southern Democrats began to push for federal legislation in the House of Representatives which would outlaw the use of federal troops in these situations, and on June 18, 1878, President Hayes signed the Posse Comitatus Act (Gates, 1982)

The Posse Comitatus Act has stayed virtually intact to this day with only minor adjustments in 1956, when the Act was repealed and then reenacted in Title 18 of the United States Code (Furman, 1960), and some changes necessary to include the United States Air Force when it separated from the Army pursuant to the National Security Act, which became law on 26 July 1947. President Ronald Reagan instituted changes during his first term in office in order to improve the nation's ability to combat the drug trade. These changes allowed limited use of military personnel and equipment for "training, intelligence gathering, and detection" (Inciardi, 1992, p.235).

## CHAPTER IV

### PASSAGE OF THE POSSE COMITATUS ACT

#### Introduction

When the Posse Comitatus Act was passed in 1878, it was completed for very specific reasons innate to the state of current events present in that era of American history. These reasons can be traced to statements made by the politicians, both House and Senate, who were attempting to get the legislation passed. This information can be found by looking at the Congressional Records which record the debates on the Army Appropriation Bills for 1877 and 1878.

The first of these years, 1877, corresponds to the first attempt by the members of the House of Representatives to pass legislation limiting the use of the Army. This proposed legislation was included as Section 5 of H.R. No. 4691, the Army Appropriations Bill for the fiscal year ending on 30 June 1878. It read:

That no part of the money appropriated by this act, nor any money heretofore appropriated, shall be applied to the pay, subsistence, or transportation of troops used, employed, or to be used or employed, in support of the claim of Francis T. Nicholls or of S.B. Packard to be governor of the State of Louisiana. Nor shall any of said money be applied in support of the claim of the two bodies claiming to be the Legislature of said State, presided over respectively by L.A. Wiltz and

Louis Bush; nor of the two bodies claiming to be the Legislature of said State presided over respectively by C.C. Antoine and Michael Hahn; nor in support of the claim of Thomas C. Manning and associates to be the supreme court of said State; nor in support of the claim of John T. Ludeling and associates to be the supreme court of said State; nor in aid of the execution of any process in the hands of the United States marshal in said State issued in aid of and for the support of any of such claims. Nor shall the Army, or any portion of it, be used in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until the same shall have been duly recognized by Congress. And any person offending against any of the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned at hard labor for not less than five nor more than ten years (Congressional Record, 1877, p.2119).

This attempt ended with no appropriations being made for the Army for that session of Congress because the Senate did not agree with the House of Representatives (Meeks, 1975).

In the next year the House of Representatives passed a different form of the legislation:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by act of Congress; and no money appropriated by this act shall be



used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment (Congressional Record, 1878, p. 3845).

This section included in H.R. No. 4867 became the Posse Comitatus Act after some minor changes occurred in Joint Committee between the House and Senate, and remains virtually unchanged even to this day.

By looking at the debates that are recorded in these Congressional Records it is possible to determine the reasons why these politicians of this era felt that the passage of the Posse Comitatus Act was necessary. This review of the Congressional Records provided ten principles for the Posse Comitatus Act and showed that these reasons could be classified into four major categories: partisan politics, branch politics, actual usage of the Army, and threatened usage of the Army.

### Partisan Politics

Partisan politics is concerned with the struggle that existed between the Republican and Democratic parties during this time frame. This struggle was discussed earlier, in Chapter III: History of the Posse Comitatus Act, and involved the slow loss of power by the Republican party, especially in the Southern States, to the Democratic party. This struggle culminated in the Presidential election of 1876, when the race was very close and the electoral votes of the last three southern states under Republican control were in

doubt. A special commission was created and it resolved the dispute in favor of the Republican candidate, Rutherford B. Hayes, along party lines. The Democrats felt that the use of federal troops in those states interfered with the fair election process (Meeks, 1976).

This led to many complaints by members of Congress, seeking passage of the Posse Comitatus Act, about attempts to use the Army to keep one political party in power while preventing the other party from fairly gaining political power. These complaints took primarily two forms: complaints about controlling the elections and complaints about controlling the State Legislatures. These complaints lead to the formulation of the first two principles for the passage of the Posse Comitatus Act:

- 1) To prevent use of the Army to control elections.
- 2) To prevent use of the Army to seize control of State Legislatures.

### Controlling Elections

One of the most forceful, and clear, condemnations of the use of the Army to keep one political party in power by Representative Atkins (Tennessee). He stated that:

There is but a single issue, and that is whether the Army shall be kept in this country as a political engine. That is all the issue there is in it: whether or not the Army shall turn out State governments; whether it shall control elections. I think the Army was designed by the framers of the Constitution to repel foreign invasion and suppress insurrection. I did not know the offices of the Army were to build up political power in this country for one party of the other (Congressional Record, 1877, p.2246).

This control of elections was claimed to have occurred in two different manners. First, the troops sent and stationed in the Southern States; mainly Florida, South Carolina, and Louisiana; were reported to have intimidated voters into either casting their votes in favor of the Republican candidate and not the Democratic candidate or not voting at all. The best description of some of these tactics was provided by Representative Robertson (Louisiana) who described the interference and impact as follows:

They rode all through the parish and created that impression, intimidating, not republicans, but those colored democrats who had joined our party, many of whom were afraid on the day of election to come to the polls without an assurance on our part that we would protect them, and some of them remained at their homes on the morning of the election (Congressional Record, 1878, p. 3852).

He also described more blatant interference:

A squad of armed men crossed the river from the opposite side to the parish of West Baton Rouge and passed the court-house there, where the polls were held, or within a hundred yards of it. And the moment that those soldiers passed in front of the polls the parties who had been appointed by the supervisor of registration as special constables went to the democratic voters and took from them the democratic tickets they held in their hands, and with threats of violence told them that they had no right to vote that ticket, and forced them to vote the republican ticket (Congressional Record, 1878, p.3852).

The second method used to influence elections involved the use of the Army to protect corrupt Returning Boards. These Returning Boards were set up in order to

properly count the votes and report the winner in each county. A good example of this complaint about controlling elections comes from Representative Harrison, a member of a special committee created to look into the use of Army personnel in South Carolina and Florida during the election of 1876. He reported that the Governor of the State of Florida testified that there was no danger of riot or insurrection, yet Federal troops were still sent to Tallahassee. Representative Harrison reports that:

In November, 1876, they were sent to Tallahassee to see that the votes were properly counted. General Grant wished a fair count. The republicans in the county in which is Tallahassee are as 4 to 1 to the democrats; yet it required an army to see that this inestimable right of free Americans should be preserved. And they did preserve it. They protected the returning boards in their chaste performances, and Florida was cheated out of its votes (Congressional Record, 1878, p.3717).

These examples show the weight and power that these Representatives felt concerning the issue of controlling elections.

#### Controlling State Legislatures

The next area of concern to the politicians who sought to pass the Posse Comitatus Act was interference in State Legislatures by the Federal Government. The best description of controlling State Legislatures in an attempt to maintain party power was provided by Representative Ellis. He stated that while "it may not perhaps be known to gentlemen on the other side, but it is known to me and to every southern member on this floor, that the greatest abuses have been permitted under the pretext of employing the

Army of the United States as a *posse comitatus* for the enforcement of the law”

(Congressional Record, 1878, p.3850).

He goes on to discuss two separate incidents in Louisiana where control of the State Legislature was taken by the Army. First,:

Look at the 5<sup>th</sup> of December, 1872, in the city of New Orleans, where on that night, in obedience to the orders of the United States marshal and under the plausible pretext of enforcing the laws of the United States, troops occupied the capital of the State and absolutely impaneled a Legislature, declared who was elected, declared who was not elected, and permitted no one to pass to the halls of the representatives of the people unless he bore the badge of the United States marshal (Congressional Record, 1878, p.3850).

Next:

Again, on the 5<sup>th</sup> of January, 1875, this country witnessed what was perhaps the saddest and most shameful spectacle it had ever beheld, when . . . General De Trobriand, in obedience to the orders which he had received from a superior officer, invaded a State capital, went in to the legislative halls where the representatives of the people were sitting, and upon the *ipse dixit* of a usurper thrust out the chosen representatives of the people and thrust in those whom that usurper would have there (Congressional Record, 1878, p.3850).

These examples of interference in the workings of State Legislatures was another major reason for the passage of the Posse Comitatus Act, and the final point under the partisan political fighting of that era in our history for the passage of that act. It was to prevent the minority party in a district from usurping control by using the Army.

### Branch Politics

Branch politics is concerned with the continuing struggle that exists between the three different branches of our Federal Government: Executive, Legislative, and Judicial. During this time frame there were still attempts to grab power from the other branches, mainly between Congress and the President. Many of the Democratic politicians felt that the Republican Presidents had overstepped their Constitutional authority as Commander-in-Chief of the Army, and these Democrats sought to remove some of that usurped presidential authority and return it Congress. Therefore this passage of the Posse Comitatus Act was, for many in the Congress, an attempt to reassert the influence of Congress on control of the nation. This struggle to reassert influence provides four more principles for the passage of the Posse Comitatus Act:

- 3) To retrench the expenditures of the Army.
- 4) To reassert Legislative control over the Army.
- 5) To show that the President is not "above the law".
- 6) To settle that there is no Constitutional or legislative action supporting authority for using the Army as a posse comitatus.

### Retrench Expenditures

The discussion of retrenching expenditures, or cutting the cost, of the Army was initiated by Representative Knotts (Kentucky), who introduced what became the Posse Comitatus Act on 27 May 1878. He stated simply that "the only question then remaining is whether it tends to retrench expenditures" (Congressional Records, 1878, p.3845).

This, as the year before in discussions of the attempted legislation then proposed, was an attempt to reassert the Congressional control over the “purse strings” of the Army. In 1877, Senator Kernan (New York) stated:

The remedy is with Congress if it is believed there is danger that the Army will be used by the President for an improper purpose. The same power that authorizes Congress to disband the Army entirely would give it the power constitutionally in its discretion, for good cause, to . . . declare that the money appropriated in this act shall not be applied to sustaining troops to do certain things (Congressional Record, 1877, p.2161).

#### Assert Legislative Control

Representative Hooker (Mississippi) stated the principle for asserting legislative control. He stated that the purpose of the Posse Comitatus Act would be:

To enable the legislative department of Government alone to say in what mode and manner the Army raised, equipped, provisioned, and paid by the legislative department of the Government according to the provisions of law shall be used (Congressional Record, 1878, p.3845).

#### President is Not “Above the Law”

The idea that the President is not above the law is a long standing principle in American society, since if the President was above the law then the office would be equivalent to a King, something greatly feared in the colonial days of this nation.

Representative Knotts again provides information on this point when he stated that it

would be a great surprise to everyone in the nation “that the President of the United States, who is to enforce the law, can himself rise above the law and do with the Army what the law does not authorize him to do” (Congressional Record, 1878, p.3849). This idea is further strengthened by the concurring argument of Representative Mills who stated that the Founding Fathers did not make the Constitution “subordinate to the Army but the Army subordinate to the highest authority of the law” (Congressional Record, 1878, p.3849).

#### No Authority for the Army as Posse Comitatus

Representative Kimmel (Maryland), in a very long speech concerning the problems with a large standing army, asked what statute authorizes the use of the Army as a posse comitatus. He reported that the statute cited, under the Revised Statutes of the day, Section 788, stated:

That marshals and their deputies shall have in each State the same powers in executing the laws of the United States that the sheriffs and their deputies may have, by law, in executing the laws thereof (Congressional Record, 1878, p.3582).

He felt that the use of this statute to justify the ability of the marshals to call on the Army as a posse comitatus was a “misconstruction of a statute” (Congressional Record, 1878, p.3582). “No one . . . will attempt to maintain that a sheriff has the right to summon the Army of the United States to serve as a posse. If the sheriff cannot, how can the marshal? The authority is exactly the same” (Congressional Record, 1878, p. 3582).



Representative Knotts summarized the feelings of many in the House of Representatives when he stated that “the Army of the United States has been used in a hundred instances under the pretext of enforcing the laws without one scintilla of authority” (Congressional Record, 1878, p.3846).

#### Actual Usage

Actual usage of the Army involves the duties to which the Army had been used most often. These were the daily uses of the Army to which the representatives were adamantly opposed, and provide the next three principles for the Posse Comitatus Act:

- 7) To prevent use of the Army to execute the law.
- 8) To prevent use of the Army to aid in the collection of revenue.
- 9) To prevent use of the Army in the suppression of strikes.

#### Execute the Law

There are numerous references to the use of the Army to execute the laws throughout the Congressional Records, this being one of the primary problems associated with the Army. However, the comments of Representative Kimmel help to show more specifically what was disliked about the actions of the Army. He states that “the General of the Army . . . permitted the use of . . .” the “Army as a *posse comitatus* to invade the homes, seize the property, imprison the person, and take the lives of citizens” (Congressional Record, 1878, p.3586).

Extracts from the reports of the General of the Army and the departmental generals also show the magnitude of this problem. In an entry dated 30 September 1876, from Atlanta, Georgia:

General Ruger reports that seventy-one detachments to aid civil officers.

Hundreds more have been made. So glaring and frequent had the violations of all law become that the generals, in defense of their honor and interests, made earnest protests against these practices, recommending the passage of laws defining more accurately the duties of the soldiery" (Congressional Record, 1878, p.3581).

#### Collection of Revenue

The same extracts from the records of the generals shows several references to the use of the Army to aid revenue officers in the collection of taxes.

In an entry dated 8 October 1870, from New York:

General McDowell, commanding the Department of the East, reports as follows:

"On 3d December, in compliance with instructions from the Adjutant-General's Office, Major Abbot, with two companies of engineers, troops from Willet's Point; Major C.L. Beat, with two companies from Fort Hamilton, one from Fort Wadsworth, and one from Fort Schuyler; and Lieutenant-Colonel Kiddoo, with four companies from Fort Columbus, all under command of Colonel Vogdes, First United States Artillery, proceeded to Brooklyn to assist Colonel Pleasanton, collector of internal revenue, in the execution of his duties" (Congressional Record, 1878, p.3581).

In another entry dated 30 September 1874, from Louisville, Kentucky:

General Terry reports forty-two temporary detachments to aid revenue officers  
(Congressional Record, 1878, p.3581).

In another entry dated 19 October 1875:

General McDowell reports thirty-seven detachments to aid revenue officers  
(Congressional Record, 1878, p.3581).

### Suppression of Strikes

There was also the use of the Army to suppress strikes by the working class citizens of the time. Some of the worst strikes of the time involved the railroads, and the Army was used to suppress the strikes and protect the railroads. The following telegram sent from the Governor of West Virginia to President Hayes on 18 July 1877 provides an example:

Owing to unlawful combinations and domestic violence now existing at Martinsburgh and at other points along the line of the Baltimore and Ohio Railroad, it is impossible with any force at my command to execute the laws of the State. I therefore call upon Your Excellency for the assistance of the United States military to protect the law-abiding people of the State against domestic violence and to maintain the supremacy of the law. The Legislature is not now in session and could not be assembled in time to take any action in the emergency. A force of from two to three hundred should be sent without delay to Martinsburgh, where my aid, Colonel Delaplain, will meet and confer with the officer in command (Congressional Record, 1878, p.3637).

The next example is a written order from the Assistant Adjutant-General to the Commanding General of the Missouri, dated 23 July 1877. It reads:

Trouble threatened at Saint Louis. Secretary of War directs that you send there with least practicable delay such force from Fort Leavenworth as you can spare, and to proceed yourself if you deem it necessary (Congressional Record, 1878, p.3638).

The following excerpt from Army records dated 27 September 1872, from Detroit, Michigan:

General Cook reports as follows: "In May last fifteen hundred of these miners in the vicinity of Houghton combined in a strike; they became nearly all armed and at last not only defied the civil authorities but rescued prisoners, disarmed the sheriff's posse, and threatened the peaceably disposed. The governor of the State presenting to me official proof of this state of things, received by telegraph May 11, made very urgent application for military assistance. The emergency appearing great, I determined to give the immediate aid of a military posse" (Congressional Record, 1878, p.3581).

These examples all show the magnitude of the uses of the military to interfere in civil matters, and often to become the preferred tool for the civil authorities in the areas involved.

### Threatened Usage

Threatened usage of the Army involves perceived threats either implied or simply believed by the representatives in Congress. The one that seemed to cause the most outrage provides the final principle for the passage of the Posse Comitatus Act:

10) No strong force of Army to be stationed near large cities.

### Strong Force Stationed Near Cities

The final principle found its beginnings in the report of the Secretary of War to the Congress. During that report he stated:

It must now be accepted as a fact, which experience has demonstrated, that Federal troops may be required not only for the protection of our frontiers, but also to preserve peace and order in our more populous interior (Congressional Record, 1878, p.3679).

He went on:

The Army is to the United States what a well-disciplined and trained police force is to a city, and the one is quite as necessary as the other (Congressional Record, 1878, p.3679).

Finally, he stated:

The great value of a strong Federal force stationed in the vicinity of our great cities would be seen in the prevention of mobs and violence, probably far more than in their suppression (Congressional Record, 1878, p.3679).

These statements by the Secretary of War greatly troubled the representatives in Congress.

Representative Wright stated on the floor of Congress:

I want to know whether the doctrine is to be established in this land that a State of the Union is a province to be supervised, protected, and governed by the central power of the General Government. This doctrine which is contained in the report of the Secretary of War is monstrous. The language of that officer does not contemplate merely that in the event of trouble or difficulty troops shall be brought from their several stations, but it asserts that it is right and proper they should be stationed near to our cities and populous towns. God forbid that the day should ever come in this country . . . its purpose would be coercing the people and holding them in terror. We want no such interference by the General Government with the sovereignty of the States (Congressional Record, 1878, p.3679).

He went on to state that “this is not a military Government” (Congressional Record, 1878, p.3679).

### Conclusion

The review of the Congressional Record provides ten principles for the passage of the Posse Comitatus Act. These principles are:

- 1) To prevent use of the Army to control elections.
- 2) To prevent use of the Army to seize control of State Legislatures.
- 3) To retrench the expenditures of the Army.
- 4) To reassert Legislative control over the Army.
- 5) To show that the President is not “above the law”.

- 6) To settle that there is no Constitutional or legislative action supporting authority for using the Army as a posse comitatus.
- 7) To prevent use of the Army to execute the law.
- 8) To prevent use of the Army to aid in the collection of revenue.
- 9) To prevent use of the Army in the suppression of strikes.
- 10) No strong force of Army to be stationed near large cities.

These ten principles form the basis for the Posse Comitatus Act, it is for these purposes that the Act was created, and it is for these reasons that the Act is continued. These will form the basis of the analysis on whether the Act is still necessary in the United States today. This modernization of the Posse Comitatus Act will take place in Chapter V, and will determine the impact of the Act in today's society.

## CHAPTER V

### ANALYSIS

In this chapter the ten principles that were determined from review of the Congressional Record as having been the basis for the creation and existence of the Posse Comitatus Act will be looked at with an eye at how applicable they are to a modern American society. This will help to determine whether or not the Posse Comitatus Act is still a necessary part of modern life in the United States or whether it is superfluous.

The ten principles are:

- 1) To prevent use of the Army to control elections.
- 2) To prevent use of the Army to seize control of State Legislatures.
- 3) To retrench the expenditures of the Army.
- 4) To reassert Legislative control over the Army.
- 5) To show that the President is not "above the law".
- 6) To settle that there is no Constitutional or legislative action supporting authority for using the Army as a posse comitatus.
- 7) To prevent use of the Army to execute the law.
- 8) To prevent use of the Army to aid in the collection of revenue.



- 9) To prevent use of the Army in the suppression of strikes.
- 10) No strong force of Army to be stationed near large cities.

### Control Elections

The idea that the Posse Comitatus Act exists to prevent the Army, or any of its personnel, from interfering in free elections is not supported by the fact that there was already existing legislation that served that purpose. Senator Bayard reported that Section 5529 of the Revised Statutes had the following provision:

Every officer or other person in the military or naval service, who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State, shall be fined not more than \$5,000, and imprisoned at hard labor not more than five years (Congressional Record, 1878, p.4299).

Therefore, since there were statutes in place to prevent the interference of the military with elections there was no necessity for the Posse Comitatus Act for that purpose.

### Control of State Legislatures

The unhindered operation of freely elected legislatures is the cornerstone of our democratic society. For that reason, interference with those operations is not allowed. However, unlike in the times following the Civil War, when troops took control of several southern State Legislatures, there is no way that could occur without sparking outrage

throughout the nation. The example of Rodney King in Los Angeles is a perfect example of why that sort of thing is not really possible today.

Rodney King, an unemployed construction worker, was chased by police cars through a Los Angeles suburb. As he stepped from his car he was shot with a Taser stun gun and hit with a 50,000 volt burst of electricity. He was then kicked, hit, and beaten by the police officers at the scene. This might have gone completely unnoticed if not for a bystander with a video camera. According to Time, "Within hours, the horrific scene was being replayed on national television. Within days, outraged protesters were demanding the resignation" of the Los Angeles police chief (Prud'homme, 1991, p.16). The beating of Rodney King occurred just before 1 a.m. on Sunday morning, by the evening of the next day had been shown on the Los Angeles news, and by Tuesday it was shown to the entire nation (Tobar & Berger, 1991).

This speed of information, which allows, even without the presence of a reporter, footage of incidents as they occur to reach a national audience in a little over one day, makes it very unlikely that federal troops would be able to interfere in local matters without inciting a national uproar. Anything like the forcible overthrow of a State Government would be on every television and cable program within hours, probably minutes, and each of these programs would have live video coverage of the situation. This type of activity would incite an incredible national outrage like no other seen in this country.

### Retrench Expenditures

While it is the goal of most legislative bodies to control the budgets that they are responsible for, even more so in this modern era of “balanced budgets”, it is not logical that hindering the uses to which Federal troops can be used will reduce expenditures. First, there is the issue that in most situations that are foreseen, and almost all that have appeared in the judicial system involving the Posse Comitatus Act, the activities that involve the military are relatively small and usually in support of civil agencies who are funding the operations that occur. Second, the issue of having these cases appear in court only to have them thrown out wastes a tremendous amount of money on its own. By allowing the use of the military these cases can be kept in the court system and followed to their conclusion. This closing of a criminal loophole will make the entire criminal justice system more efficient, and in the long run will save money.

### Assert Legislative Control

This idea of the need for a branch of the federal government to flex its muscles and take back its place as the most important of the three branches of government is absurd. It goes completely against the designs which the Founding Fathers placed into the Constitution of the United States. This Constitution was written so that our government would have three coequal branches each with requisite and specified checks and balances on the other two branches.

### President is Not "Above the Law"

Similarly, the idea of the President being "above the law" is also absurd in our democratic society. The office of the President was specifically designed so that it did not have the power to operate outside the laws of our nation. If it could then it would be equivalent to a monarch, or king, which is something the colonists who founded the nation were terribly afraid of and took great measures during the building of our nation to prevent.

### No Authority for the Army as Posse Comitatus

While this principle is correct, the need to stress it by reiterating in the form of the Posse Comitatus Act is nonexistent. The military is not supposed to answer to the commands of civil law enforcement officials, nor is it to enforce the laws against our own citizens; the purpose of the military with respect to civil law enforcement is simply to aid our criminal justice officials in better performing their duties. An example of the benefits possible from this cooperative relationship can be seen in today's efforts to interdict drug smuggling into the United States.

Yearly drug trafficking into the United States grew from \$45 billion in 1979 to nearly \$80 billion in 1981. The drug smugglers, aided by their tremendous profits, were able to equip themselves with the finest equipment: boats, aircraft, and weapons. All of this outstanding equipment only made them more effective at circumventing the drug interdiction efforts of civilian law enforcement. The federal, state, and local law enforcement agencies were only able to stop approximately 15% of the drugs that were being smuggled. Congress realized that while these civilian law enforcement agencies

were not equipped to combat the better equipped smugglers the military “had the personnel and sophisticated equipment the civil law enforcement authorities needed to stop incoming drugs” (Hohnsbeen, 1986, p.417). However, the military was prevented from participating due to the Posse Comitatus Act. Congress therefore modified the Act in 1981. These modifications made it possible for the military to provide information, equipment, facilities, training, and advice to the civilian law enforcement agencies that needed help (Hohnsbeen, 1986). While the military makes it possible for the civilian law enforcement agents to stop drugs, it is the responsibility of these civilian agents to actually enforce the laws. Without the aid of the military these agents would not be able to apprehend and stop even a fraction of the smugglers currently being stopped, and the continued existence of the Posse Comitatus Act provides a loophole for these criminals to use.

In addition, there is the fact that members of the military are still citizens, and as such have the same responsibilities as every other citizen to aid law enforcement officials who request their assistance. The Posse Comitatus Act complicates the situation and makes it very difficult to insure that the case will not be dismissed due to a violation of the Act.

### Execution of Laws

While use of the military to enforce civil laws seems to be improper, what the members of Congress in 1878 were concerned with were invasions of homes, seizing of property, and imprisonment of citizens. All three of these are very important, however, there is no need for the Posse Comitatus Act to protect American citizens from these

occurrences. The Founding Fathers placed in the Constitution certain rights to protect people from intrusions of those types. While this Bill of Rights originally included ten, and now twenty-six amendments to the Constitution, only a few need to be discussed here. These few; the Fourth, Fifth, and Sixth Amendments; deal directly with the particular fears of the Congress of 1788 and are therefore vital to a discussion concerning that fear of the Army being used invade homes, seize property, or imprison citizens.

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (The Constitution, 1991, p.22).

The Fifth Amendment to the Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation (The Constitution, 1991, p.22).

The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence (The Constitution, 1991, p.22).

While these Amendments, or Rights, did exist for nearly a hundred years before 1878, and were still supposedly violated by the Army; it is important to note the fact that the Bill of Rights has undergone a tremendous amount of change over the last hundred years. Originally the Bill of Rights was not applicable to the States, which were free to do what they wished. The Fourteenth Amendment, which states in Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (The Constitution, 1991, p.25-26).

began to change that. Its ratification was used as a requirement for allowing the ex-Confederate states to return to the United States (Furman, 1960). The Fourteenth Amendment did not, however, require that the States protect the same citizen rights that the Federal government was to protect, it simply required "due process". What "due

process” actually encompassed was left up to each State and the judicial system to determine.

While the judicial system has been unwilling to “totally incorporate” the Bill of Rights into the Fourteenth Amendment’s requirement for “due process”, which means making all the rights enumerated in the Bill of Rights applicable to the States, they have been willing to “selectively incorporate” the parts that they have felt are important (Israel, Kamisar, & LaFave, 1994). Today, the majority of the rights guaranteed in the Bill of Rights have been incorporated into the “due process” clause of the Fourteenth Amendment.

Due to the extensive judicial precedence over the last century which has improved and expanded the protections afforded citizens, all citizens have the protections of the Fourth, Fifth, and Sixth Amendments, by way of the Fourteenth Amendment; and these protect them from unreasonable searches and seizures and improper warrants. These additional protections, which did not exist in 1878 make violations, of the type the Posse Comitatus Act was created to stop, unlikely.

#### Collection of Revenue

The use of the military for collection of revenue is also very unlikely for many of the same reasons cited for Execution of the Law. The Internal Revenue Service, and other agencies tasked with the collection of taxes, have well established enforcement branches that specialize in the collection of their specific types of revenue.



### Suppression of Strikes

The use of the military to suppress strikes, while also unlikely, was, even in 1878 as cited in the Congressional Records, done according to the appropriate procedures. The governments of the States with problems asked the federal government for assistance when the problem became too big for their own forces (Congressional Record, 1878). The need to contact the Federal Government for assistance is highly unlikely since the National Guard in each state is very capable of controlling any foreseeable situation.

### Strong Force Stationed Near Large Cities

The fear of having strong forces near our large cities and populous towns has been outlived. America today has grown so quickly and the military so large that there are military bases near almost every major metropolitan area. In fact there are currently:

70 Air Force installations

58 Army installations

18 Marine Corps installations

81 Navy installations

in the 50 states (HQ NORAD-USSPACECOM/J1, personal communication, March 29, 1996).

In addition to the large number of military installations in the United States there is also the issue of improved transportation. It is possible to fly from the eastern most United States to either Alaska or Hawaii in approximately eight hours (Staff Analyst/ SDS International, Inc., personal communication, March 29, 1996). With today's modern transportation any town in the United States, no matter how small, could have military

personnel in it within a matter of only a few hours. This is a great deal more immediate than the required months to travel from one end of the United States to the other that existed when the Posse Comitatus Act was passed.

Despite this potential there has been no problems with having these forces so close to the cities where they are stationed, and in the case of many towns the presence of a military installation provides opportunities for substantial employment and a large influx of capital. This is demonstrated by the recent political problems involved with determining which bases to close. Politicians in Congress are doing everything they can to prevent the installations in their districts from being closed. This is because of the positive impact that these military installations have had on the communities that they reside in or near.

## CHAPTER VI

### CURRENT USAGE OF THE POSSE COMITATUS ACT

The modern usage of the Posse Comitatus Act has been as a tool to get evidence excluded at trial due to the interference of the military or military personnel in the investigation or arrest of the defendant. This use requires a quick look at the Fourth Amendment and the Exclusionary Rule, as applied by the courts, followed by a discussion of the application of the Posse Comitatus Act as an exclusionary rule in modern court cases.

#### Fourth Amendment and the Exclusionary Rule

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (The Constitution, 1991, p.22).

However, the Framers of the Constitution and the Bill of Rights did not specify how the Fourth Amendment is to be enforced. This left it up to the judicial branch of government to determine how to satisfy the requirements of the Fourth Amendment. In 1914, the Supreme Court, in Weeks v. United States, drafted a rule which has had a widespread

effect on American criminal justice. This rule is known as the Exclusionary Rule, and it is a judge-made rule not required in the Constitution. The Exclusionary Rule calls for the barring of evidence that is secured in violation of the Fourth Amendment prohibition against unreasonable searches and seizures (Wilkey, 1992).

Some scholars have pointed out that there is a basic confusion, even among those whose daily lives are touched by this rule, such as prosecutors and the police, over the origins and legal backing for the Exclusionary Rule. Many people think that the Constitution guarantees the exclusion of evidence obtained from unreasonable searches and seizures, and that the Exclusionary Rule is the right that is guaranteed by the Fourth Amendment (Kamisar, 1992).

As a result of the Exclusionary Rule, "the most valid, conclusive, and irrefutable factual evidence is excluded from the knowledge of the jury or the consideration by the judge" (Wilkey, 1992, p.191). The judicial process is supposed to be a process for finding the truth. "The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial" (Wilkey, 1992, p. 192). In the truth-seeking process evidence should be excluded only when it is unreliable, not when in fact it is very reliable but simply obtained improperly. By excluding the most reliable evidence the courts are not fulfilling their responsibility to insure a fair trial on society's behalf.

#### The Posse Comitatus Act as an Exclusionary Rule

Before discussing the use of the Posse Comitatus Act to try and exclude evidence from court it is important to be able to determine whether or not there has been a violation

of the Act itself. This can be accomplished by looking at a few of the court cases which have involved debate over the Posse Comitatus Act.

Probably the most widely cited and useful cases involving the Posse Comitatus Act in court were the cases resulting from the Wounded Knee uprising in 1973. These three cases; United States v. Jaramillo, United States v. Red Feather, and United States v. McArthur; provide three simple tests for determining whether there has been a violation of the Posse Comitatus Act in a particular situation (Boschee, 1985).

In United States v. Jaramillo, the court decided that there is a violation of the Posse Comitatus Act when the use of military personnel to execute laws “pervades that activities of civilian law enforcement officers” (Boschee, 1985, p.116). In this case the court acquitted the defendants, who were charged with interfering with federal officers lawfully engaged in the performance of their duties, because the prosecutor was unable to prove beyond a reasonable doubt that civilian law enforcement authorities had acted lawfully along with the participation of military personnel (Meeks, 1975).

In United States v. Red Feather, the court decided that there is a violation of the Posse Comitatus Act when “there is a direct active use of military personnel to execute the laws” (Boschee, 1985, p.118). In order to clarify what a “direct active use of military personnel” is the court listed several activities: “arrest; seizure of evidence; search of a person; search of a building; investigation of a crime; interviewing witnesses; pursuit of an escaped civilian prisoner; [and] search of an area for a suspect . . . “ (United States v. Red Feather, 1975, p.925 as cited in Boschee, 1985, p.118).

In United States v. McArthur, the United States District Court decided that there is a violation of the Posse Comitatus Act when the use of military personnel was “regulatory, proscriptive, or compulsory in nature” (Boschee, 1985, p. 120).

These three court cases seem to provide a framework of three tests which allows a decision to be made over whether or not a violation of the Posse Comitatus Act has occurred. However, in fact there are only two different tests created by these courts. United States v. Jaramillo created a test that considered passive activities by military personnel. United States v. Red Feather and United States v. McArthur created a test against the active use of military personnel. In order to get the third test it is necessary to look at another case, People v. Burden, which occurred in the state of Michigan.

Burden was a member of the United States Air Force who participated as an undercover agent in a civilian drug investigation. The defendants filed a motion to exclude Burden’s testimony, alleging that his participation was a violation of the Posse Comitatus Act. The trial court ordered the exclusion, the intermediate appellate court affirmed, and the Michigan Supreme Court reviewed reversing the lower decisions.

The Michigan Supreme Court stated that “[one] must look to the nature of the assistance rendered the civilian authority in each case to determine if the aid may be characterized as military” (People v. Burden, 1981, p.446 as cited in Boschee, 1985, p.122). Several factors were cited as being vital to the determination that Burden’s participation was civilian; first, he was not in military uniform; second, he was not acting under military orders; and third, he was not a regular military law enforcement agent. In fact, Burden was an individual who himself was in trouble with the civilian law enforcement, who decided to help in the investigation in return for dropping criminal

charges that were pending against him. This court decided that there is no violation of the Posse Comitatus Act if the assistance rendered by the military personnel is civilian in nature (Boschee, 1985).

There have also been several court cases which have held that the Posse Comitatus Act is not violated when there is a military purpose that justifies military involvement and only incidentally involves civilian law enforcement. This is critical since military personnel are subject to the Uniform Code of Military Justice (UCMJ), and therefore are subject to investigation, arrest, and criminal prosecution by the military criminal justice system (Boschee, 1985).

By looking at court applications of the Posse Comitatus Act it has been possible to show four court made tests to determine whether or not a violation of the Posse Comitatus Act has occurred. Now that these tests are available it is possible to look at the more recent cases where the Posse Comitatus Act has been used in an attempt to exclude evidence from trial.

In looking at the use of the Posse Comitatus Act and its application in the court system as an exclusionary rule, there are two cases which are vital to look at. They provide two varying opinions on the use of the Act towards the exclusion of evidence.

First, there is United States v. Walden, in which three marines worked undercover for the Treasury Department. These marines purchased firearms illegally from the defendants, who were convicted under federal firearms statutes. The defendants appealed contending that there was a violation of the Navy Regulation which makes the Posse Comitatus Act applicable to the Navy and Marine Corps, and that the evidence should have been excluded. While the Fourth Circuit Court of Appeals found that there was a

violation of the Navy Regulation, and thus the Posse Comitatus Act, it refused to exclude the evidence. The court found that there was no evidence that there was an intentional violation of the Act and that the Act was designed to protect the nation as a whole, and not the rights of individuals. The court then proceeded to state that violations of the Posse Comitatus were extremely rare, and therefore did not justify the application of an exclusionary rule. However, they did state that "Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider whether adoption of an exclusionary rule is required as a future deterrent" (United States v. Walden, 1974, p.77 as cited in Boschee, 1985, p.127).

The second case was Taylor v. State, in which a military policeman requested the assistance of local civilian police in an investigation of an off-base drug source. The civilian police arrested the defendant after the military police made an undercover drug purchase. "During the arrest the military policeman pulled a gun, and after the arrest he participated in the search of the defendant's house. The military policeman also delivered the drugs to the civilian authorities and filled out the submittal forms" (Boschee, 1985, p.127). The defendant was convicted and subsequently appealed citing that all of the evidence obtained pursuant to his arrest was illegal and should be excluded since the arrest was made in violation of the Posse Comitatus Act. The Oklahoma Court of Criminal Appeals held that while a violation of the Posse Comitatus Act does not automatically lead to the exclusion of evidence under the facts of the case at hand the trial court should have excluded the evidence (Taylor v. State, 1982 as cited in Boschee, 1985, p.128).

So as these two cases show there is some disagreement over whether or not a violation of the Posse Comitatus Act should be handled by excluding the evidence that is



improperly obtained. However, it is important to note that the Act is being used to exclude evidence at trial, particularly in cases involving drugs due to the increase in military involvement in drug interdiction since a revision of the Act occurred during President Reagan's first term (Posse Comitatus Act, 1981). This modern use as an exclusionary rule has a great impact on the criminal justice system and on the current Federal Government attempts to fight a "War on Drugs". It has made it very difficult to use all of the resources at our nation's disposal, because there is the possibility that if the military is involved then evidence obtained will be found inadmissible and the charges dismissed.

## CHAPTER VII

### DISCUSSIONS AND RECOMMENDATIONS

From the information provided from the Congressional Record it is possible to discover the reasons for the passage of the Posse Comitatus Act. As shown earlier, there were ten reasons for Congress to pass the Act. It is then possible to determine whether the Act is still applicable today, or whether it has outlived its usefulness as defined by the people who created it.

The research has shown that the Act has, in fact, become unnecessary. Today, most of the situations that existed and made it necessary for Congress to enact it, no longer exist. In addition, the presence of an instantaneous television media, that can get information from anyplace and send it to anywhere else in the world in no time, makes it impossible for the situations that required the creation of the Posse Comitatus Act to occur.

There is also the issue of the need for cooperation between military commanders and the civilian law enforcement agencies of nearby communities. According to an article by H. W. C. Furman:

. . . the Act is archaic and a hindrance to a commander who wishes to control the off-post conduct of his soldiers; to safeguard their entrance and egress to and from his post; to promote good public relations in the communities and to

respond to the inner urgings of the good citizen in putting down or preventing crime. The military community is now more closely tied to the civilian community and a high crime rate in one has a direct impact on the crime rate of the other . . . (Furman, 1960, p.129).

This need for cooperation is vital, especially with the current push toward community policing.

There is also the fact that the Posse Comitatus does not cover the several different types of federal military that exist today.

The Act expressly proscribes the use of the Army or Air Force to enforce civil law; it applies to the Navy and Marines only as a matter of policy. When the National Guard is federalized or placed in the service of the United States, it too is subject to the Act. At all other times, the National Guard is a state militia, exempt from the Posse Comitatus Act and thus available to join the posse comitatus. The Coast Guard is not covered by the Act (Hohnsbeen, 1986, p.407).

The Posse Comitatus Act is a hindrance to American law enforcement and a totally unnecessary and problematic defense strategy for modern criminals. The Act was never intended to provide another loophole for criminals to use in order to sidestep convictions. It was supposed to be a separate criminal offense that violators were to be charged with, and the fact that in its entire history not a single person has ever been charged with violating it provides proof that it is not necessary (O'Shaughnessy, 1976).

The Posse Comitatus Act should be removed from the books. The Act has been called "obscure and all-but-forgotten" by a court within the nation's judicial system

(Chandler v. United States, 1948), and in many ways simply creates more confusion and complications for the people it affects:

Because the passage of the Posse Comitatus Act did not halt all operations of the Army in law enforcement, but merely erected a maze to be threaded by each Commander at each request for troops, it behooves his legal counsel to become familiar with its ins and outs (Furman, 1960, p.97).

It is important to realize that the removal of the Posse Comitatus Act will not blanket authorize all types of interference in the execution of civilian law by the military, but it will remove the barriers to cooperation that currently exist. The removal of the Act will allow greater cooperation between civilian and military law enforcement, and make our entire criminal justice system more efficient. It will allow our law enforcement community to utilize every tool at their disposal, and will not provide the criminals with an excuse to get away with more crimes. With today's get tough on criminals stance, this would send a clear and concise message to criminals: don't break the law because we are all looking at you, and there is no loophole to help you get away!

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